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October 9, 2009

*Via Electronic Comment Filing System*

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: **Petition For Declaratory Ruling Regarding AT&T's U-verse PEG Product, CSR-8126, MB Docket No. 09-13**

Dear Ms. Dortch:

Pursuant to Section 1.206 of the Commission's rules, this *ex parte* notice is filed on behalf of the Alliance for Community Media, *et al.* ("ACM"). On October 9, 2009, James Horwood, Gloria Tristani and the undersigned, of Spiegel & McDiarmid LLP, and counsel to ACM, met with Commissioner Robert M. McDowell and his Legal Advisor, Rosemary Harold, to discuss the above-referenced petition, and the matters described in the attached handouts.

If there are any questions, please feel free to contact the undersigned.

Very truly yours,

Tillman L. Lay

Attachments

cc: The Honorable Robert M. McDowell (Robert.McDowell@fcc.gov)
Rosemary Harold (Rosemary.Harold@fcc.gov)

**_Ex Parte_ of ACM, _et al._ in**
**FCC DN 09-13, CSR-8126**

Over the past few months, AT&T (together with USTelecom and the Independent Telephone & Telecommunications Alliance, in one instance) has made several *ex parte* visits and filings relating to the above-captioned proceeding and ACM's Petition for Declaratory Ruling, urging the Commission to deny that Petition.[1] This *ex parte* filing summarizes the response of the ACM Petitioners to those *ex parte* filings.

## I. Contrary to the Claims of AT&T and Its Allies, ACM Petitioners Do Not Seek to Preempt Any State Video Franchising Laws.

AT&T and its allies repeatedly assert that granting the petitions in this docket would "effectively" or "implicitly" preempt state law – specifically, new state video franchising laws – and that for that reason, the petitions should be denied.[2] Neither AT&T nor its allies, however, even so much as identifies any particular provision of any state law that would be preempted, much less explains how the relief requested in ACM's Petition would preempt any such state law.

The assertion is a red herring. ACM's Petition does not seek the preemption of any state law or local franchise, and granting the relief requested would preempt no such law or franchise.

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[1] *See* June 11, 2009, letter to Marlene Dortch from James E. Smith, MB Docket No. 09-13 ("June 11 AT&T *Ex Parte*"); June 26, 2009, letter to Marlene Dortch from Henry Hultquist, MB Docket No. 09-13 ("June 26 AT&T *Ex Parte*"); July 13 2009, letter to Marlene Dortch from Jonathan Banks, Joshua Seidemann & Robert W. Quinn, MB Docket 09-13 ("July 13 AT&T/USTelecom/ITTA *Ex Parte*"); August 11, 2009, letter to Marlene Dortch from Henry G. Hultquist, MB Docket 09-13 ("August 11 AT&T *Ex Parte*"); August 19, 2009, letter to Marlene Dortch from Robert W. Quinn ("August 19 AT&T *Ex Parte*"); August 25, 2009, letter to Marlene Dortch from Robert W. Quinn ("August 25 AT&T *Ex Parte*"). The July 13 AT&T/USTelecom/ITTA *Ex Parte*, in turn, cites to four other reply comments filed in this docket, and to which we will refer here: April 1, 2009, letter to Michael J. Copps from Governors Jon S. Corzine and Michael Rounds ("NGA Letter"); April 1, 2009, letter to Marlene Dortch from Rep. Phil Montgomery ("NCSL Letter"); April 1, 2009, letter to Michael Copps from several state attorneys general ("NAAG Letter"); and Reply Comments of the American Legislative Exchange Council, March 31, 2009 ("ALEC Reply Comments").

[2] July 13 AT&T/USTelecom/ITTA *Ex Parte* at 1-4; June 26 AT&T *Ex Parte* at 2; August 19 AT&T *Ex Parte* at attachment, p.1; August 25 AT&T *Ex Parte* at attachment, p. 1; NGA Letter at 1; NCSL Letter at 1; NAAG Letter at 1; ALEC Reply Comments at 1-16.

As already pointed out in ACM's Reply Comments, we do not contend that § 611 requires a franchising authority to impose any PEG requirements,[3] and our Petition does not seek to impose any PEG requirements where none exists under a state or local franchise. To the contrary, as ACM's Petition itself makes clear on its face, the franchises under which each of the individual local government and PEG center Petitioners operate – be they state or local franchises – require the operator to set aside "capacity" for PEG use and to provide PEG "channels," thereby triggering § 611.[4] Indeed, with respect to every individual local government or PEG center Petitioner operating in a state with a new state video franchising law under which AT&T has been franchised, those new state laws uniformly provide for the setting-aside by the state-franchised operator of "capacity" for PEG use and the delivery of PEG "channels."[5]

Thus, with respect to each Petitioner that is a local government or PEG center, its franchise – again, be it a state or local franchise – is indisputably one that requires the operator to designate "channel capacity" for PEG use within the meaning of § 611. In addition, the state video franchising laws themselves require compliance with federal laws and regulations, and thus clearly contemplate that PEG channels will be provided in a manner that satisfies

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[3] Reply Comments of ACM, *et al.*, MB Docket No. 09-13, at 20 (filed August 1, 2009) ("ACM Reply Comments").
[4] Petition for Declaratory Ruling of Alliance for Community Media, *et al.*, No. 09-13, CSR 8126, at 3-7 (filed Jan. 30, 2009) ("ACM Petition"); ACM Reply Comments at 20 & n.38.
[5] For Petitioners Sacramento Metropolitan Cable Television Commission and Foothill-DeAnza Community College District, *see* Cal. Util. Code § 5870(a) ("The holder of a state franchise shall designate a sufficient amount of capacity on its network to allow the provision of the same number of [PEG] channels, as are activated and provided by the incumbent cable operator that has . . . activated and provided the greatest number of PEG channels . . . under any terms of any franchise in effect in the local entity on January 1, 2007"). For Petitioner Chicago Access Network Television, *see* 220 ILCS § 21-601(a) ("the holder [of a state franchise] shall (i) designate the same amount of capacity on its network to provide for [PEG] access use, as the incumbent cable operator is required to designate under its franchise terms in effect with a local unit of government on January 1, 2007; and (ii) retransmit to its subscribers the same number of [PEG] channels as the incumbent cable operator was retransmitting to subscribers on January 1, 2007"). For Petitioner City of Raleigh, North Carolina, *see* N.C. Gen. Stat. § 66-357(b) & (c) (On written request, a state-franchised "cable service provider must provide the requested PEG channel capacity," and "A city with a population of at least 50,000 is allowed a minimum of three initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city").

requirements of the Cable Act. Accordingly, the Petition would not preempt any state video franchising laws, and AT&T and its allies are wrong in suggesting otherwise.

Where, as in the case of the ACM Petitioners, § 611 is in fact triggered and does apply, the Commission has authority to construe its meaning, including its references to "channel capacity," as it does with all provisions of the Communications Act. *Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert denied*, ___ U.S. ___, 129 S.Ct. 2821 (2009). That, along with applying existing FCC rules and policies, is all that the ACM Petition asks the Commission to do.[6] It therefore presents no preemption issue at all.[7]

## II. The Commission's Authority over PEG Channels Is Not Nearly So Narrow as AT&T Claims.

AT&T claims that the Cable Act "specifies one – and only one – federal obligation with respect to how [PEG] programming is provided," namely, that PEG channels must be on the basic tier where a cable system is not subject to effective competition.[8]

AT&T's claim is demonstrably false. Even its ally, ALEC, proves as much by conceding that § 611(e) prohibits a cable operator that provides PEG capacity from exercising editorial

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[6] As noted in the ACM Petition (at 23-25 & 31-33), the Cable Act defines "channel," and § 611 uses the same phrase, "channel capacity," as the Act's must-carry and leased access provisions. The Commission has also by rule and policy long imposed the same signal quality standards on PEG channels as it has on broadcast channels (*id.* at 25-27). All the Petition asks is that the Commission continue to recognize these same principles in the context of AT&T's PEG product.

[7] Even if AT&T and its allies were correct (and they are not) that the Commission somehow lacks authority to construe § 611 or establish requirements relating thereto (July 13 AT&T *Ex Parte* at 2; ALEC Reply Comments at 9), the very precedent ALEC cites for this proposition (*id.*) holds that § 611's purpose was to prevent states from doing precisely what AT&T and its allies contend state video franchising laws do:

> "In passing the PEG provision [Section 611], Congress thus merely recognized and endorsed the preexisting practice of local franchises on the granting of PEG access . . . . *All the statute does, then, is preempt states from prohibiting local PEG requirements (if any states were to choose to do so)* and preclude federal preemption challenges to such [PEG] requirements, challenges that cable operators might have brought in the absence of [Section 611].

*Time Warner Entertainment v. FCC*, 93 F.3d 957, 972-73 (D.C.Cir. 1996) (citations omitted) (emphasis added).

[8] June 26 AT&T *Ex Parte* at 1. *Accord* June 11 AT&T *Ex Parte* at attachment, pp. 4-5; July 13 AT&T/USTelecom/ITTA *Ex Parte* at 2; August 11 AT&T *Ex Parte* at attachment, p. 2; August 19 AT&T *Ex Parte* at attachment, p. 1; August 25 AT&T *Ex Parte* at attachment, p. 1.

control over that capacity. ALEC Reply Comments at 12. Moreover, our Petition argues that AT&T's PEG product violates this very "editorial control" prohibition in § 611(e). ACM Petition at 23-30; ACM Reply Comments 19-20 & 25-26.

But § 611 and other provisions of the Cable Act and Commission rules also impose other requirements on cable operators that provide PEG channel capacity, almost all of which AT&T's PEG product violates. Thus, § 611 obligates cable operators whose franchises so provide to furnish "channel capacity" for PEG use, statutory terms that the Commission is authorized to construe, and has construed. As ACM has shown in its filings in this docket, AT&T's PEG product fails to provide such "channel capacity." ACM Petition at 31-33; ACM Reply Comments at 21-23.

Commission rules and decisions likewise establish that PEG channels are subject to the Commission's cable signal quality standards and that cable operators may not single out PEG programming for discriminatory treatment, yet AT&T's PEG product does just that. ACM Petition at 8-30; ACM Reply Comments at 23-25.

In addition, the "pass through" obligations of the Commission's closed captioning rules apply to any programming that is delivered in closed captioning to a cable operator or other video program distributor, and there is no exception for PEG programming delivered with closed captioning. Yet again, AT&T's PEG product has failed to comply with this obligation.[9]

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[9] ACM Petition at 33-42; ACM Reply Comments at 27-30. We are aware that AT&T now claims that it is scheduled to deploy closed-captioning capability in its PEG product in the second or third quarter of 2009. June 11 AT&T *Ex Parte* at attachment, p. 2; August 11 AT&T *Ex Parte* at attachment, p. 2; August 25 AT&T *Ex Parte* at attachment, p. 2. AT&T has not said, however, whether it is deploying PEG closed captioning universally throughout its U-verse video footprint, and whether it is providing closed captioning automatically to PEG programmers without any need for PEG programmers to request it – both of which AT&T no doubt does for commercial programmers, and which FCC rules require. AT&T's closed captioning obligation applies everywhere it provides U-verse video service, and requiring PEG programmers, unlike other programmers, to have to specifically request that capability in order to receive it is yet another form of discrimination against PEG. In

(Continued . . .)

The bottom line is that the Cable Act and Commission rules and policies impose obligations on cable operators with respect to provision of PEG capacity and delivery of PEG channels well beyond the single obligation alleged by AT&T, and that AT&T's PEG product fails to comply with virtually all of those obligations.

## III. AT&T Is In Fact Providing "Cable Service" and Is Thus a "Cable Operator."

AT&T persists in its *ex parte* filings with the argument that its multichannel video service is not a "cable service" and thus that it is not a "cable operator" subject to Title VI.[10] We will not burden the Commission with repeating the many fallacies of this contention except to note that AT&T's U-verse multichannel video service is in fact engaging in "one-way transmission" of video programming to subscribers within the meaning of § 602(6)(A), and that the "subscriber interaction" in AT&T's U-verse video service is unquestionably "required for the selection or use" of video programming within the meaning of § 602(6)(B). ACM Reply Comments at 5-14 & 19. Although AT&T clearly wishes it were otherwise, the "cable service" definition is transmission protocol agnostic.

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(. . . continued)
addition, AT&T's belated effort does not cure its longstanding and willful past failure to comply with the FCC's closed captioning rules, nor has AT&T ever even bothered to ask properly for waiver of those rules. ACM Reply Comments at 28-30. Moreover, Petitioners have reason to believe that the purported closed captioning capability that AT&T professes to have added to its PEG product is not equivalent, in terms of functionality and costs, to the closed captioning it provides for non-PEG video programming channels.

[10] June 11 AT&T *Ex Parte* at attachment, p. 5; August 11 AT&T *Ex Parte* at attachment, p. 4; August 19 AT&T *Ex Parte* at attachment, p. 4; August 25 AT&T *Ex Parte* at attachment, p. 4.

## IV. AT&T's U-verse Video PEG Product Singles Out PEG, and Essentially Only PEG, for Discriminatorily Inferior Treatment, and Such Discriminatory Treatment Is In No Way "Intertwined" With Broadband Deployment.

AT&T asserts that its PEG product "is a different, not inferior, product," that its "U-verse TV is inextricably intertwined with broadband deployment," and that granting the petitions "would stop [technological] advances in their tracks by locking video providers into providing PEG programming in the same way they have for the past three decades."[11] These assertions rest on factually flawed premises and unsound analysis.

As an initial matter, AT&T's claim that its PEG product treats PEG programming in a manner that is merely "different, not inferior," to non-PEG programming on its U-verse video system is roundly refuted by the record. That record leaves no dispute that, in terms of accessibility, functionality and quality, AT&T's PEG product treats PEG programming in a markedly inferior fashion as compared to AT&T U-verse video system's treatment of all other basic or cable programming service tier programming.[12] In fact, AT&T's bland statement that the "principal difference between U-verse PEG and commercial programming is the manner by which subscribers access the programming,"[13] is the ultimate of euphemisms. One could likewise argue that the "principal difference" between a desert and a rain forest is their "access" to water, but what a difference it is.

AT&T's statement fails to note the lack of closed captioning capability, secondary audio programming ("SAP") capability, DVR capability and channel surfing capability, as well as the

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[11] August 11 AT&T *Ex Parte* at attachment, pp. 2-3; June 11 AT&T *Ex Parte* at attachment, pp. 2-3; July 13 AT&T/USTelecom/ITTA *Ex Parte* at 1.

[12] ACM Petition at 8-22; ACM Reply Comments at 2-3, 24-25 & 30-37. *See also* comments of other parties cited in *id.* 2-3 nn. 3-4, 24 nn. 42-45 & 31-33 nn. 53-37.

[13] June 11 AT&T *Ex Parte*, at attachment, p. 2. *Accord* August 11 AT&T *Ex Parte* at attachment, p.2; August 19 AT&T *Ex Parte* at attachment, p. 2; August 25 AT&T *Ex Parte* at attachment, p. 2.

different and inferior protocols and compression techniques, that have characterized AT&T's PEG product. ACM Petition at 8-22. The record in this proceeding underscores the adverse effect on PEG programmers and viewers resulting from this different and inferior "access" and service functionality that AT&T provides to PEG programming: substantially reduced subscriber access to, and viewership, of PEG programming, and the uniquely local and public interest programming it provides both to local residents generally and to underserved segments of the community such as the visually impaired.[14]

AT&T's attempt to justify its discriminatorily inferior treatment of PEG as somehow necessary to promote broadband deployment is disingenuous. AT&T has chosen to single out PEG, and essentially only PEG, among all other types of traditional cable video programming, for discriminatorily unfavorable treatment in terms of accessibility, functionality and signal quality. Apparently AT&T believes that only PEG, unlike the other video programming it carries in its U-verse video system, must be singled out and sacrificed on the supposed pretext of broadband deployment.

But the record in this proceeding refutes that assertion. The commercial channels on AT&T's U-verse video system, although transmitted to the subscriber's converter box in Internet protocol, function just like video channels on a traditional cable system. ACM PEG Petition at 10-20; ACM Reply Comment at 8-14 & 31-33. Moreover, AT&T has admitted that it could treat PEG programming in the same way but complains about the cost of doing so. ACM Petition at 21-22; ACM Reply Comments at 16-18 & 38-39. Aside from the fact that, relative to AT&T's immense size and capital budget, its claim of cost burden rings hollow, *id.* at 16-18, AT&T has essentially conceded that this is not a matter of technological feasibility, but of AT&T's own,

[14] *See* sources cited in note 12 *supra*.

unilateral business decision to save costs by singling out PEG programming for disparate, inferior treatment.

Thus, contrary to AT&T's suggestion, the ACM Petition does not ask the FCC to stop AT&T from using Internet protocol, or any other protocol, to transmit PEG or other video programming. The ACM Petition only calls for treatment of PEG programming channels that is equivalent to AT&T treatment of other basic and traditional cable programming service tier channels on its U-verse system.

It is difficult to take seriously AT&T's claim that requiring PEG programming channels to be treated like other video programming channels on its system would "lock in" AT&T to the past, while AT&T's treatment of those other video programming channels does not.[15] We doubt, for instance, that the Commission would even consider a claim by AT&T that it was unilaterally entitled to ignore the must-carry provisions of the Act or Commission rules because such a violation was "intertwined with broadband deployment" or necessary to avoid "locking in" AT&T to past technologies.

There is no reason to reach a different conclusion with respect to PEG. As we have shown in our prior filings, AT&T's PEG product, and its inherently discriminatorily inferior treatment of PEG, violates both the Act and Commission rules and policies, and this was a deliberate business choice AT&T made in designing its PEG Product. There is no exception to those requirements, nor should there be.

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[15] In fact, contrary to AT&T's implication, *e.g.*, August 25 AT&T *Ex Parte* at attachment, pp. 2-3 & 5-6, the Internet protocol nature of AT&T's system actually should make it easier, not more difficult, to direct the specific PEG channels of the local community where a subscriber resides to that subscriber. ACM Petition at 21 & Exh. G; ACM Reply Comments at 31 & Exh. A.

The uniquely local character of PEG programming and the vital localism and diversity interests it serves deserve maximum protection from the Commission as guardian of the public interest, as contrasted with the economic interests of AT&T, the largest telecommunications company in the world.[16] If AT&T were to be given a license to relegate PEG to discriminatorily inferior accessibility, functionality and signal quality, then all other, far smaller cable operators with lesser resources would no doubt claim entitlement to the same license. And that would lead to the eventual extinction of PEG. Moreover, it would establish a principle that cable operators are entitled to discriminate against and among applications and content that they are obligated by law to carry on their cable systems. To establish such a non-neutrality principle would have truly negative implications for broadband policy generally.

[16] *See* ACM Reply Comments at 3-5 & 37-39.

**ALLIANCE FOR COMMUNITY MEDIA**

**FCC Docket MB 09-13 (CRS-8126 *et al.*)**

## I. AT&T's U-Verse Multichannel Video Service is a "Cable Service."

A. AT&T's U-verse video programming is a proprietary package of video programming (*i.e.*, of AT&T's own choosing) that AT&T transmits to subscribers over its own landline system of closed transmission paths that crosses local ROW. AT&T is therefore delivering a "cable service" over a "cable system."

B. AT&T admits it is an MVPD and thus that it delivers "video programming."

C. AT&T admits that it chooses the contents of its video programming package. It therefore admits that it is engaging in "one-way transmission" of video programming within the meaning of § 602(6)(A). *NCTA v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994); *Video Dialtone Reconsideration Order*, 7 FCC Rcd 5069, 5071 (1992); *Cable Modem Ruling*, 17 FCC Rcd 4798, 4834 (2002).

D. All of the subscriber interaction involved in AT&T's multichannel video programming service fits comfortably within "subscriber interaction . . . which is required for the *selection or use* of such video programming" within the meaning of § 602(6)(B). *See SNET*, 515 F.Supp. 2d 269, 279-80 (D. Conn. 2007); H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. at 169 (1996).

E. The "cable service" definition is transmission protocol agnostic. It also draws no distinction between whether the system delivers one channel at a time as the subscriber selects it (VOD), or delivers all channels on a tier at once. *See SNET*, *supra*.

F. Since AT&T's multichannel video programming service is not delivered by a "radio-based system," through video common carriage, or through an OVS, § 651 dictates that AT&T must be providing the service as a "cable operator" under Title VI.

## II. Finding That AT&T Is Providing a "Cable Service" Would Not Pre-Judge Any Larger Issues About Treatment of Internet Services or Broadband Networks.

A. IP is a transmission protocol, not the Internet. AT&T's video programming service is *not* Internet-based; it just happens to be delivered from AT&T's VHO to the subscriber's set-top box in Internet protocol (where it is converted to digital or analog). But AT&T's multichannel video service remains a proprietary, "closed" package of video programming that is *not* delivered to subscribers over the Internet. It is therefore readily distinguishable from online video services such as Hulu and YouTube.

B. As a closed, proprietary package of video programming not delivered over the Internet, AT&T's U-Verse video service is not Internet access and thus bears no resemblance to the service at issue in the *Cable Modem Ruling*.

C. As a Title VI "cable service," AT&T's U-verse video service is subject to preemptively light regulation at all levels. *See* §§ 624(a) & (f)(1).

## III. Even if AT&T Were Not Providing a "Cable Service' (but it clearly is), the FCC May Grant All of the Relief Requested in ACM's Petition Under Title I.

A. In its January 12, 2006, *ex parte* letter (at p. 9) in WC Docket No. 04-36, AT&T conceded as much:

> [I]f additional safeguards are necessary, *the Commission's Title I authority over video services is more than sufficient to address them*; AT&T and others have made clear that they are fully prepared to pay franchise fee equivalents, *to support PEG programming*, and to otherwise work with local governments and the Commission to protect the public interest.

(Emphasis added.)

B. We believe, however, that the applicability of Title VI to AT&T's U-verse video offering is clear, and that Title VI presents a much cleaner, more competitively-neutral, and preferable, way to resolve the issue.

## IV. The Commission Can and Should Act Promptly on the PEG Petitions.

A. AT&T is forging ahead as if it were not subject to Title VI, to the detriment of PEG centers and their viewers.

B. AT&T once believed prompt FCC action was required on the U-verse "cable service" issue. In the same January 12, 2006, *ex parte* letter (at 3-5), AT&T argued that "Commission action" on the U-verse "cable service" issue was "overdue," and that it was "imperative" that the Commission "do so quickly."